LIBRARY
SUPREME COURT, U. S.

No. 21 [redacted]

Office-Supreme Court, U.S.
FILED
OCT 4 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
WINN I. NEWMAN,
1126 16th Street, N. W.,
Washington 6, D. C.
Attorneys for Petitioner.

ISADORE KATZ,
1501 Broadway
New York 36, N.Y.
Of Counsel.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	2
A. The Proceeding	2
B. The Arbitration Agreement	3
C. Interstate Commerce	4
D. The Grievances	4
1. The Baltimore Grievance	4
2. The East Pittsburgh Grievance	5
Reasons for Granting the Writ	7
A. The Decision Below with Respect to the Baltimore Grievance Is in Conflict with Decisions of This Court Relating to Federal Preemption and Raises an Important Question of Federal Law	7
1. The Preemption Doctrine as Previously Enunciated Does Not Apply to Enforcement of Contracts	8
2. The Action Seeks Enforcement of a Contract	9
3. The Decision Below Raises Important Questions of Federal Law	12
B. The Decision Below with Respect to the East Pittsburgh Grievance Is in Conflict with Decisions of This Court Relating to the Enforcement of Labor Arbitration Agreements and with Decisions of the Court of Appeals for the Third Circuit Interpreting Federal Law	13
Conclusion	18
Appendix A	19
Appendix B	25
Appendix C	28

TABLE OF CASES

	Page
Allis-Chalmers Manufacturing Co., 117 NLRB 744	11
Association of Salaried Employees v. *Westinghouse Electric Corp.*, 348 U.S. 437	9
Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238	8
Baker & Taylor Co., 109 NLRB 245	11
Charles Dowd Box Company v. *Courtney*, 368 U.S. 502	8, 13
Doyle Smith v. *Evening News Association*, Oct. Term 1962, No. 13	7, 12
Employing Plasterers Association, 118 NLRB 17	10
Garner v. *Teamster Union*, 346 U.S. 485	8
General Analine & Film Corp., 89 NLRB 407	10
Guss v. *NLRB*, 352 U.S. 817	12
I.A.M. Lodge No. 1743, AFL-CIO (J. A. Jones Construction Co.), 135 NLRB No. 139, 49 LRRM 1684	12
IUE v. *Westinghouse*, 268 F. 2d 352 (C.A. 3)	16
Local 33, Hod Carriers v. *Mason Tenders Council*, 291 F. 2d 496 (C.A. 2)	11
Local 174, Teamsters v. *Lucas Flour Company*, 369 U.S. 95	8
Local Lodge No. 1836, IAM v. *Raytheon Co.*, No. 419, Oct. Term 1962	7
Marine Engineers Assoc. v. *Interlake Steamship Co.*, 370 U.S. 173	8
McDonnell Aircraft Corp., 109 NLRB 930	9
N.L.R.B. v. *Radio & Television Engineers*, 364 U.S. 573	12
Nepco Unit of Local 95 v. *Nekoosa Edwards Paper Co.*, 287 F. 2d 452 (C.A. 7)	9
Plumbing Contractors Assn., 93 NLRB 1081	10
Radio Corp. of America v. *Associated Professional Engineering Personnel*, 291 F. 2d 105 (C.A. 3) cert. den. 368 U.S. 898	17
Retail Clerks v. *Lion Dry Goods, Inc.*, 369 U.S. 17	11
San Diego Building Trades Council v. *Garmon*, 359 U.S. 736	8
Steelworkers v. *American Mfg. Co.*, 363 U.S. 564	9, 13, 14
Steelworkers v. *Enterprise Wheel Corp.*, 363 U.S. 593,	13, 14

Page

Steelworkers v. *Warrior & Gulf Co.*, 363 U.S. 574 11, 13, 14
Sunnyvale Westinghouse Salaried Employees Ass'n. v. *Westinghouse Electric Corp.*, 175 F. Supp. 685 (W.D. Pa., 1959) 18
Telegraphers v. *Chicago & N.W.R. Co.*, 362 U.S. 330 11
Textile Workers Union of America v. *United Textile Workers*, 258 F. 2d 743 (C.A. 7) 11
Town & Country Mfg., 136 NLRB No. 111, 49 LRRM 1918 11
Underwood Corporation v. *Local 267, IUE*, 183 F. Supp. 205 (Conn. 1960) 18
United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 10
Weber v. *Anheuser-Busch*, 348 U.S. 468 8

OTHER AUTHORITY

N.L.R.B. *Twenty-first Annual Report* (1956) 11

STATUTES

Labor-Management Relations Act of 1947 (61 Stat. 136-162, 29 U.S.C. § 151 *et seq*) 2
Sec. 8(b)(4)D 11, 25
Sec. 9(c) 10, 25
Sec. 10(k) 12, 26
Sec. 301 9, 12, 13, 27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No.

JAMES B. CAREY, AS PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, James B. Carey, as President of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, prays that a writ of certiorari issue to review the opinion and order of the Court of Appeals of the State of New York, entered in the above-entitled case on July 6, 1962.

Opinions Below

The opinion of the Court below (Appendix A, *infra*, pp. 19-24) is reported at 11 N.Y. 2d 452, 230 N.Y.S. 2d 703. The opinion and order of the Appellate Division are reported at 15 A.D. 2d 7, 221 N.Y.S. 2d 303 (R. pp. 134-148).* The opinion and order of Special Term appear in the record at pp. 116-127.

---

* References preceded by the letter R refer to the Record on Appeal in the court below, copies of which have been filed herewith.

Jurisdiction

The order and judgment of the Court below (Appendix A, *infra*, pp. 19-24) were entered on July 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (62 Stat. 929).

Questions Presented

1. Whether a state court is pre-empted of its jurisdiction to enforce arbitration provisions of a collective bargaining agreement by compelling arbitration of a grievance alleging that the employer violated the agreement by assigning work covered by the agreement to employees outside the collective bargaining unit and refusing to apply the terms and provisions of the agreement to the performance of such work.

2. Whether a court may deny arbitration of a grievance involving the interpretation, application or claimed violation of a collective bargaining agreement under an agreement providing for arbitration of such grievance on the basis of its conclusion that an arbitrator lacked authority under the agreement to make an effective award.

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., § 151 *et seq*) are printed *infra*, as Appendix "B" to the petition (pp. 25-28).

Statement

A. *The Proceeding*

The Union and the Company entered into a collective bargaining agreement on October 1, 1950, which, by successive supplements, has been renewed and extended and includes the times of the grievances which the Union seeks

to arbitrate. The agreement covered many plants of the Company, including its plants at Baltimore, Maryland, and East Pittsburgh, Pennsylvania, where the grievances here at issue arose. (R. 11, 52, 58-59)

Pursuant to the arbitration provisions of the collective bargaining agreement, this proceeding was commenced by the Union to compel arbitration of four unsettled grievances which the Company had refused to arbitrate on the ground that, in its opinion, the grievances did not raise arbitrable issues (R. 8-52). Under the provisions of the arbitration agreement, Section XIV-A, Subsection C (5), when the Company notifies the American Arbitration Association that an unsettled grievance "does not, in its opinion, raise an arbitrable issue," the American Arbitration Association loses its authority to process a request for arbitration until a Court has determined that the grievance does raise an "arbitrable issue or issues" (R. 14-15). The instant petition relates to two of these grievances, one referred to herein as the Baltimore grievance, and the other as the East Pittsburgh grievance. The court below declined to compel arbitration of both grievances.

B. *The Arbitration Agreement*

The arbitration agreement is broad in scope, providing, insofar as material here, for arbitration of any grievances involving action taken or failure to act subsequent to the effective date of the agreement, which involves "the interpretation, application or claimed violation of a provision of this Agreement" (Appendix C, *infra*, p. 29, R. 11-17).

The arbitration agreement does not exclude from arbitration any grievance otherwise within its terms, but limits in certain respects the arbitrator's award-making power in subsection D of Section XIV-A (Appendix C, *infra*, pp.

30-31, R. 15-16). At issue in connection with the East Pittsburgh grievance is the limitation therein that "no arbitrator shall . . . be authorized to: . . . (2) Establish or modify any wage or salary rate, job classification, or classification of any employee . . . or any time value under the incentive system." The denial of arbitration of the Baltimore grievance rests upon a preemption theory and not upon any asserted limitation in the agreement.

C. *Interstate Commerce*

The Company is admittedly engaged in a business which affects commerce within the meaning of the Labor-Management Relations Act, 1947, 29 U.S.C.A. § 152 (6) and (7) (R. 10, 53-57).

D. *The Grievances*

1. *The Baltimore Grievance.*

The Union was certified by the National Labor Relations Board as the collective bargaining representative of the production and maintenance employees at the Company's Baltimore Works. Section I, Paragraph 1, of the collective bargaining agreement, and Item 2 of its Appendix, provide that the Company "agrees to recognize" the Union for this unit, among others (R. 25-26, Appendix C, *infra*, pp. 28, 31-32).

On March 5, 1958, the Union filed a grievance protesting the Company's refusal to apply the provisions of its agreement with the Union to the performance of work on induction heating, including assembly and wiring, power brake operations, machining operations, and attending to tool crib and storeroom operations (R. 24).

The Union contended that the work in question was production work identical to that regularly performed by employees in the Union's bargaining unit (R. 103-104).

The Union contended further the refusal of the Company to apply the agreement to the performance of this work was a violation of the agreement, particularly Section I, 1, the Recognition clause; Section VI-A, B, the Union Shop clause; Section XII, the Seniority clause, and Item 2 of the Appendix to the agreement, the description of the unit covered (R. 104).

The Company refused to arbitrate this grievance on the ground that the question raised by the grievance was within the exclusive jurisdiction of the National Labor Relations Board and further contended that it would be inequitable for the Court to compel arbitration of this grievance (R. 75).

Special Term refused to enforce the arbitration agreement on the ground that this grievance involved the composition of the bargaining unit and was in the sole province of the National Labor Relations Board (R. 127).

The Appellate Division affirmed on the ground that "orderly process" would best be served "by limiting jurisdiction of the issue here to the NLRB and denying recourse to arbitration" (R. 144). Mr. Justice Eager dissented (433).

The Court of Appeals affirmed on the ground that the subject matter of the grievances was "within the exclusive jurisdiction of the NLRB" (Appendix A, pp. 21-22). Mr. Justice Fuld dissented (Appendix A, pp. 23-24).

2. *The East Pittsburgh Grievance.*

In this grievance, the Union claimed that the Company's action in 1957, in lowering the time value allowance, under the incentive system for a molding operation, violated Section VIII, 8, E (2) of the Agreement (Appendix C, *infra*, pp. 28-29, R. 20-23). That Section of the Agreement provides that recorded time values will be changed only

when there is a change in the method of manufacture, tools, materials, design, production conditions, or servicing conditions that affects the time value and that only that portion of the value that is affected by the change will be adjusted. It provides further that "Management recognizes that time values should be revised as soon as possible after the changes have been completed" (R. 89-90).

An adjustment of a time value directly and seriously affects the earnings of the employees who work under the incentive system under which time values determine earnings. The Union alleged that the downward adjustment in the time value complained of was based, in substantial part, on changes which had been made in the operation during the preceding sixteen years. The Union contended that under the above Section, the Company could not aggegate changes in the operation over a long period of time (1938 to 1954) and consider them together with a new change in an operation for the purpose of establishing or modifying a time value. (R. 101-103).

The Company conceded in explanation of its failure to take action at the time of the prior changes that the past changes in the operation "were too insubstantial to warrant an adjustment of the time value" at the time they were made (R. 88).

The Company defended against the Union's motion to compel arbitration on the ground that the "only award which the arbitrator could make in such a proceeding would be an award modifying the new time value * * *" and that this would be in flat violation of Section XIV-A, D, (2), which limits the award-making power of the arbitrator (R. 91). The Company pointed to nothing in the agreement which excludes this grievance from the scope of the arbitration agreement.

Special Term directed arbitration (R. 122-124); the Ap-

pellate Division unanimously reversed. It interpreted the provisions of the agreement or undertaking, and denied arbitration, because, in its view, the Union could not secure an "effectual award." (R. 137-139). The Court of Appeals affirmed on the ground that the agreement to arbitrate did not encompass this grievance because no "valid" award could be made (Appendix A, *infra*, pp. 20-21).

Reasons for Granting the Writ

A. *The Decision Below With Respect To The Baltimore Grievance Is In Conflict With Decisions Of This Court Relating To Federal Preemption And Raises An Important Question Of Federal Law.*

The first issue set forth in this petition is whether the New York courts were preempted of jurisdiction to enforce the arbitration provisions of the collective bargaining agreement between the Company and the Union by virtue of the enactment of the National Labor Relations Act. This issue presents for the Court's consideration another facet of the interrelationship between the statutory scheme for the protection of public rights established in Title I of the Labor Management Relations Act and that established in Title III thereof for the enforcement of private contractual rights. This relationship is also questioned in *Doyle Smith* v. *Evening News Association*, No. 13, Oct. Term 1962 certiorari granted March 26, 1962, and *Local Lodge No. 1836, IAM* v. *Raytheon Co.*, No. 419, Oct. Term 1962, filed Sept. 6, 1962.

The issue here presented is substantially the same as that in the *Raytheon* case, the principal difference being that in the *Raytheon* case the action was initiated in Federal District Court pursuant to Section 301, and in the instant case the action was initiated in the state court of New York. As Federal law governs enforcement of agreements to

arbitrate in the state courts (*Charles Dowd Box Co. v. Courtney*, 368 U.S. 502), the controlling considerations in both cases are the same.

1. The Preemption Doctrine As Previously Enunciated Does Not Apply To Enforcement of Contracts.

The decision of the New York Court of Appeals with respect to the Baltimore grievance is in conflict with recent decisions of the Court in the *Dowd Box Co.*, *Lucas Flour*, and *Atkinson* cases,[1] and raises a serious question under Federal law pertaining to the regulation of labor-management relations.

The decision below with respect to this issue, with Justice Fuld dissenting, is extremely brief. Without discussion, the court concluded that the Baltimore grievance was "within the exclusive jurisdiction of NLRB," a view which it described as recently "reaffirmed" by the United States Supreme Court in *Marine Engineers Assoc.* v. *Interlake Steamship Co.*, 370 U.S. 173.

The *Marine Engineers Association* case involved the enforcement of state labor relations policy through injunctive process. It was thus of the same character as the action in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 736, and related cases[2] in which the enactment of the National Labor Relations Act was found to confer upon the National Labor Relations Board exclusive jurisdiction.

The doctrine of preemption evolved in this line of cases, however, was expressly held inapplicable by this Court to suits to enforce collective bargaining agreements, whether brought in state or Federal courts. *Charles Dowd Box Co.*

---

[1] *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502; *Local 174, Teamsters v. Lucas Flour Company*, 369 U.S. 95; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238.

[2] E.g., *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468.

v. *Courtney*, 368 U.S. 502; *Local 174, Teamsters* v. *Lucas Flour Company*, 369 U.S. 95, 101, n. 9; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 245, n. 5. Congress considered, but rejected, proposals to put enforcement of collective bargaining agreements within the jurisdiction of the NLRB. Instead it specifically created in Section 301 machinery to facilitate contract enforcement through private action. *Charles Dowd Box Co.* v. *Courtney*, 368 U.S., at 513; *Association of Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U.S. 437, n. 2.

2. The Action Seeks Enforcement Of A Contract.

Whatever overtones the Baltimore grievance may carry with respect to the Union's certification, the grievance sought to be arbitrated is a work assignment grievance. The essential question to be answered in arbitration is whether the Company was obligated by its agreement to assign the work in question to employees covered by its agreement with the Union and to apply the terms of the agreement to the performance of this work.[3] The agreement provides that an arbitrator's authority over the grievance will extend to the interpretation, application, or claimed violation of the agreement involved in the action taken by the Company. The clearly announced federal policy is to enforce agreements to arbitrate with respect to every arbitrable grievance. *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564.

The Board recognizes the distinction between certification and work assignment on which the arbitrability of this grievance is based. In *McDonnell Aircraft Corporation*, 109 NLRB 930, the Board rejected a claim that an

[3] The grievance as written (R. 115) fairly sets forth the nature of the issue raised. Grievances need not be drawn with the precision of a common law complaint. *Nepco Unit of Local 95* v. *Nekoosa Edwards Paper Co.*, 287 F. 2d 452 (C.A. 7).

employer refused to bargin in violation of Section 8(a)(5) of the Act when it unilaterally transferred work outside a bargaining unit and refused to recognize the certified union as representative of the employees performing this work. The Board viewed the transfer of work outside the unit as an action,

> "which gave rise to a *dispute over the interpretation and administration of the agreement which should be and was resolved through the collective bargaining process.* Indeed, it is apparent that the Union, which instituted this proceeding, originally recognized this dispute to be one of contract interpretation when it appropriately invoked the contractual grievance procedure." 109 NLRB, at 934. (Emphasis added.)

Thus, the Board, to which the court below would give exclusive jurisdiction over this grievance as a certification matter, has specifically held that an identical grievance is properly viewed as a contract matter to be handled through the grievance and arbitration procedure. Other decisions of the Board confirm the difference between certification and work assignment. *General Analine & Film Corp.*, 89 NLRB 407; *Plumbing Contractors Association*, 93 NLRB 1081; *Employing Plasterers Association*, 118 NLRB 17. A unit determination and certification only identifies the group of employees for which a bargaining representative is designated.[4] It does not preclude an em-

[4] Even if this grievance were assumed to touch matters which the Board might consider in a certification proceeding pursuant to Section 9, it was not the intention of Congress to preclude the settlement of such matters through privately agreed upon means. An employer and a union may agree upon the appropriate unit and the majority status of the union without any intercession by the Board. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72, n. 8. Use of the Board's machinery for the determination of representatives is but one of the alternative

ployer from altering the work assignments of its employees. The determination of work assignment which involves wages, hours and other terms and conditions of employment is a matter for collective bargaining and inclusion in a collective bargaining agreement. *Town & Country Mfg.*, 136 NLRB No. 111, 49 LRRM 1918. Cf. *Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330.[5] A unit determination answers the question, "Who does the union represent?" An agreement as to work assignment answers the question, "What work do they perform?" It is the Union's contention in this case that the parties reached agreement as to the assignment of work. It now seeks to enforce that agreement through arbitration.

The grievance sought to be arbitrated also differs from a jurisdictional dispute within the meaning of Section 8(b)(4)(i)(D) and 8(b)(4)(ii)(D) of the Act. The Union has engaged in no conduct which falls within Section 8(b)(4)(i) or (ii). *Local 33, Hod Carriers* v. *Mason Tenders Council*, 291 F. 2d 496, 504 (C.A. 2). The Union seeks

---

methods available if the parties are unable to agree upon voluntary methods for determining this question. NLRB, *Twenty-First Annual Report*, 29 (1956). Even where the Board's processes are invoked, the Board encourages consent elections and gives the widest scope to agreements reached as to the appropriate unit. *Allis-Chalmers Manufacturing Co.*, 117 NLRB 744, 745; *Baker & Taylor Co.*, 109 NLRB 245, 246. Section 9 does not impose limitations on Section 301 of the Act. *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U.S. 17. See also *Textile Workers Union of America* v. *United Textile Workers*, 258 F. 2d 743 (C.A. 7), cited therein.

[5] While these cases involve bargaining over the assignment of work to employees of other employers through subcontracting, it makes no effective difference whether an employer seeks to assign work to other of its employees outside the unit or to employees of another employer. From the standpoint of the contractual right which the Union seeks to enforce, the grievance herein is the same as the grievance over subcontracting as to which arbitration was compelled in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574.

only to enforce its agreement through the agreed upon means.[6]

3. The Decision Below Raises Important Questions Of Federal Law.

The decision below significantly limits the enforceability of agreements to arbitrate under Section 301 and to that extent frustrates and impairs the underlying policy of the national labor laws to foster the peaceful and voluntary settlement of disputes through arbitration. Section 203(d) of the Act. Like the parallel decision in *Doyle Smith* v. *Evening News Association, supra,* now under review, it would increase rather than decrease the burden of the Board and substitute the uncertainty of the Board's exercise of its processes for the certainty of contractual means for settlement of disputes. Cf. *Guss* v. *NLRB,* 352 U.S. 817. More important, it would thwart Congress' avowed intent to provide for enforcement of collective bargaining agreements in the courts. The extension of the preemption doctrine in the decision below beyond the bounds charted by this Court thus raises questions of the federal law relating to enforcement of collective bargaining agreements which are substantial and warrant its review.

---

[6] Moreover, even where a jurisdictional dispute within the meaning of Section 8(b)(4)(D) exists, the procedure provided in Section 10(k) of the Act stresses voluntary means of settling such disputes. If no voluntary means is agreed upon, the Board must decide the dispute, relying among other things, upon arbitrators awards and the terms of agreements. *NLRB* v. *Radio & Television Engineers,* 364 U.S. 573; *I.A.M. Lodge No. 1743 AFL-CIO (J. A. Jones Construction Co.),* 135 NLRB No. 130, 49 LRRM 1684. It would be indeed anomalous to deny courts jurisdiction to enforce arbitration of work disputes out of deference to the Board's special expertise, while the Board is commissioned to search the opinions of arbitrators to find guidance for the resolution of such disputes.

B. *The Decision Below With Respect to the East Pittsburgh Grievance Is In Conflict with Decisions of This Court Relating to the Enforcement of Labor Arbitration Agreements and With Decisions of the Court of Appeals for the Third Circuit Interpreting Federal Law.*

The decision of the Court of Appeals with respect to the East Pittsburgh grievance raises an important question of federal law relating to the enforcement of collective bargaining agreements under Section 301 (a) of the Labor-Management Relations Act (29 U.S.C. § 185, 61 Stat. 156) and is in conflict with the mandate of this Court in the *American Manufacturing, Warrior & Gulf,* and *Enterprise Wheel* cases,[7] as well as decisions of the Court of Appeals for the Third Circuit. The Court of Appeals for the State of New York, no less than the federal courts, was bound to follow and apply federal law. (*Charles Dowd Box Company* v. *Courtney,* 368 U.S. 502) It did not do so, and its decision gives rise to diversity and conflict which it "is one of the traditional functions of this Court . . . to resolve and accommodate." 368 U.S., at 514.

In *Steelworkers* v. *Warrior & Gulf Co.,* 363 U.S. 574, 582-583, this Court held:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Here the arbitration clause provides without limitation for arbitration of unsettled grievances involving "the in-

---

[7] *Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.,* 363 U.S. 574; *Steelworkers* v. *Enterprise Wheel Corp.,* 363 U.S. 593, decided June 20, 1960.

terpretation, application, or claimed violation" of any provision of the agreement. The limitation on which the court below relied was not a limitation upon the arbitrability of grievances, but limited the authority of an arbitrator "with respect to the arbitration proceeding before him." Thus, the limitation on which the court below relied by its very own terms presumed arbitrability of the grievance. Indeed, the exclusion clause in the *Warrior & Gulf* case which this Court rejected as a bar to arbitration was a clearer exclusion from arbitration than the limitation on which the court below relied herein. Here there is, in fact, no doubt as to arbitrability because the grievance clearly involves interpretation, application, *and* a claimed violation of Section VIII of the Agreement. But even if arbitrability is not clear, there is at the very least doubt as to the coverage of the arbitration clause, which the court resolved against arbitration by becoming involved with the merits of the grievance and which it should have resolved without reference thereto in favor of arbitration.

The decision of the court below is doubly disturbing because in interpreting the limitation on the arbitrator's authority as an exclusion of subject matter from arbitration, the court has performed a function "not normal to the courts" (363 U.S., at 581) in prejudging the possible remedies available for the alleged contract violation and concluding that arbitration of this grievance could result in no "valid award."

This judicial "summary judgment" of the grievance ignores the purpose of arbitration and the basic facts of industrial life. It denies the Union the "informed judgment" of an arbitrator for which it bargained. See *Steelworkers* v. *American Manufacturing Co.*, 363 U.S., at 567; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S., at 578-583; *Steelworkers* v. *Enterprise Wheel Corp.*, 363 U.S., at 597.

The grievance which the Union sought to arbitrate per-

mits a number of possible awards within the authority of the arbitrator, awards which interpret, apply, or find violations of the agreement *without* establishing a new time value or modifying existing values. An arbitrator could, without any further remedy, render an award interpreting Section VIII, 8, E, of the agreement to preclude consideration of changes in the manufacturing process which occur more than a certain period before a time value is revised as a basis for changing time values. Such an award would not establish or modify a time value, but it would nonetheless be a valuable award, clarifying the meaning of the disputed provision and providing a settled basis for further discussion of the time value at issue in this grievance and in any future grievances of a similar nature which might arise under the national collective bargaining agreement.

An arbitrator could go further to find that the Company violated the agreement in modifying the time value here at issue, while still refraining from any remedial action in his award. Again such an award would have a significant impact upon the settlement of the dispute between the parties, without exceeding the authority of the arbitrator. There is no need to set forth other alternative awards which are possible. This is a matter best left to the imagination and ingenuity of an arbitrator. The above examples amply demonstrate that meaningful valid awards are indeed possible.

As this Court has observed, "The processing of disputes through the grievance procedure is actually a vehicle by which meaning and content are given to the collective bargaining agreement." 363 U.S. at 581. The decision below would frustrate any effort to give meaning and content to Section VIII, 8, E of the collective bargaining agreement, except through industrial strife for which "arbitration is the substitute." 363 U.S., at 578. Because the objective in arbitration "is primarily to further the goal of un-

interrupted production under the agreement, to make the agreement serve [the parties'] specialized needs," even the processing of "frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware." 363 U.S., at 582, 568.[8] Where the grievance is not frivolous, the therapeutic value of interpretation of the contract or a finding that it has been violated is patent. Only the cynical presumption that the Company when presented with an award of the type above described will not comply with its agreement because an arbitrator may not himself establish or modify the time value, would justify denying the Union the arbitration for which it bargained. Such a presumption has no place in any proceeding which rests upon a statutorily based policy of avoiding industrial strife through voluntary settlement of disputes.

The decision of the court below is in direct conflict with decisions of the United States Court of Appeals for the Third Circuit. In *IUE* v. *Westinghouse*, 268 F. 2d 352 (C.A. 3, 1959), the identical parties and contract provisions were involved. The court held that in determining whether the Company had violated Section VIII, 8, E of the agreement in modifying time values, the arbitrator's task would be to interpret the contract and to determine whether Westinghouse was within or in violation of its contract. The court held: "In reaching these conclusions, the arbitrator would

---

[8] Assuming *arguendo* that the instant grievance was frivolous, an arbitrator's decision that the Company properly took into account all changes in the manufacturing method, regardless of their age, would settle a significant source of dissatisfaction to employees and contribute to the elimination of future disputes. Indeed, the statement of the court below that "Nowhere in the collective bargaining agreement is there a statement which could be construed to mean that there has been an agreement for 'therapeutic' arbitration, incapable of enforcement," stands without further comment, as the best illustration of the reason why its decision must be reviewed to prevent serious erosion of the principles set forth by this Court.

neither be establishing new time values or modifying the present ones. He would be merely declaring what the particular actual time value situations are by correct interpretation of the existing written collective bargaining agreement." See also *Radio Corporation of America* v. *Associated Professional Engineering Personnel*, 291 F. 2d 105 (C.A. 3, 1961), *cert. den.* 368 U.S. 898.

The decision below brushes aside the opinions in these cases and relies on two distinguishable District Court decisions,[9] thereby creating serious confusion in the federal law pertaining to enforcement of arbitration. If not reversed, it will result in an increase in litigation over the arbitration obligation and in frustration of the methods for peaceful settlement of industrial disputes with a resultant increase in industrial interest. Accordingly, the aspect of the decision below should also be reviewed so that serious questions it raises as to the underlying principles of the federal law may be answered.

---

[9] *Underwood Corporation* v. *Local 267, IUE*, 183 F. Supp. 205, (Conn., 1960), and *Sunnyvale Westinghouse Salaried Employees Ass'n* v. *Westinghouse Electric Corp.*, 175 F. Supp. 685 (W.D. Pa., 1959), were both decided prior to June 1960. In the *Underwood* case, the exclusion on which the Court relied was clearly an exclusion from arbitration and not a limitation on the arbitrator's authority. In the *Sunnyvale* case, which was affirmed *per curiam* by the Third Circuit, 276 F. 2d 927, also prior to June, 1960, the relief claimed was beyond the arbitrator's authority. In the light of the later *Radio Corporation* decision, there is substantial doubt whether the *Sunnyvale* decision remains good authority in the Third Circuit.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
WINN I. NEWMAN,
1126 16th Street, N. W.,
Washington 6, D. C.
Attorneys for Petitioner.

ISADORE KATZ,
1501 Broadway
New York 36, N. Y.
Of Counsel.

APPENDIX A

STATE OF NEW YORK COURT OF APPEALS

No. 150

In the matter of JAMES B. CAREY, AS PRESIDENT OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O., *Appellant-Respondent*,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, *Respondent-Appellant*.

OPINION

UNREVISED AND UNCORRECTED. NOT FOR PUBLICATION.

PER CURIAM:

We are in accord with the disposition of the Appellate Division in modifying the order of Special Term.

This appeal, the facts of which have been sufficiently set forth in the opinions below, results from a motion to compel the arbitration of three grievances. Arbitration has been ordered as to one, and denied as to the others.

Whether the grievance at the Mansfield, Ohio plant actually concerns re-hiring or discharge is properly a matter to be decided by the arbitrator. Furthermore, the Company is not prejudiced by the inartful manner in which the complaint was originally drawn, since it clearly understood the thrust of the problem.

As to the delay in seeking a court order for arbitration, allegedly amounting to an abandonment of the claim in this case involving a collective bargaining agreement, that question should be argued in the forum which the parties have voluntarily chosen—arbitration. (See, *Matter of Straight Line Foundry & Machine Corp.* v. *Wojcik*, 9 N.Y. 2d 867;

Matter of Novelty Fabrics Corp. v. *Fink*, 2 N.Y. 2d 894; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593). Nothing herein, however, is to be construed as changing decisions in the usual arbitration cases, such as *Matter of Zimmerman* v. *Cohen*, 236 N.Y. 15.

We think that the grievance arising at the East Pittsburgh plant, involving the "time value allowance", was not covered by the provisions of the collective bargaining agreement which provided for arbitration. "[S]ince arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute" (*Steelworkers* v. *American Mfg.*, *supra*, 570-571). The parties here having agreed that no arbitrator should have authorization to "establish or modify" time values, it is clear that such problems had, by agreement, been taken out of the arbitration process outlined in the contract. To submit such a grievance to arbitration now would be an idle gesture, as no valid award could be made. Nowhere in the collective bargaining agreement is there a statement which could be construed to mean that there has been an agreement for "therapeutic" arbitration, incapable of enforcement.

Not only is the character of the time values which may have been set in the original agreement to be determined here (See, *Radio Corporation of America* v. *Association of Professional Engineering Personnel*, 291 F. 2d 105; *International Union of Electrical, Radio and Machine Workers* v. *Westinghouse Electric Corporation*, 268 F. 2d 352), but in addition how much, if at all, pre-existing changes in procedures could be incorporated into management's change of the time values. This must, necessarily, encompass an equitable modification of existing values, which is beyond the range of the authority granted to the arbitrator by the parties (See, *Underwood Corporation* v. *Local 267, International Union of Electrical, Radio & Machine Workers*, 183 F. Supp. 205; *Sunnyvale Westinghouse Salaried Employees*

Association v. *Westinghouse Electric Corporation*, 175 F. Supp. 685).

Finally, the grievance at the Baltimore plant, involving the definition of the bargaining units, seems to us under federal law to be within the exclusive jurisdiction of NLRB, which has the expertise to make clear the precise nature of the bargaining units certified by it. This view has recently been reaffirmed by the United States Supreme Court, in the following language (*Marine Engineers Beneficial Assoc.* v. *Interlake Steamship Co.*, — U.S. —, 30 LW 4437, June 11, 1962):

> "A centralized adjudicatory process is also essential in working out a consistent approach to the status of the many separate unions which may represent interrelated occupations in a single industry. Moreover, as the national agency charged with the administration of the federal labor law, the Board should be free in the first instance to consider the whole spectrum of possible approaches to the question, ranging from a broad definition of 'labor organization' in terms of an entire union to a narrow case-by-case consideration of the issue. Only the Board can knowledgeably weigh the effect of either choice upon the certainty and predictability of labor management relations, or assess the importance of simple administrative convenience in this area.
>
> * * * * * * *
>
> The need for protecting the exclusivity of NLRB jurisdiction is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the Board. While the Board's decision is not the last word, it must assuredly be the first. In addition, when the Board has actually undertaken to decide an issue, relitigation in a state court creates more than a theoretical danger of actual conflict between state and federal regulation of the same controversy."

The First Circuit appears to have reached the same conclusion, in reversing the District Court, in *Raytheon Co.* v. *Local Lodge No. 1836 of District 38 IAM*, — F.2d —, 50 LRRM 2337, decided June 4, 1962. (See also, *International Chemical Workers Union* v. *Olin Mathieson Chemical Corporation*, 202 F. Supp. 363).

The order appealed from should be affirmed, without costs.

COURT OF APPEALS

IN THE MATTER OF JAMES B. CAREY, ETC., *Petitioner-Appellant,*

against

WESTINGHOUSE ELECTRIC CORPORATION, *Respondent-Cross-Appellant.*

FULD, J. (dissenting in part):

I would modify the order appealed from by reversing so much of it as denies arbitration of the Baltimore plant grievance.

The fact that the matter sought to be arbitrated, turning as it does on a bargaining unit description in the contract's recognition clause, may also involve an unfair labor practice or a question concerning representation which may ultimately give rise to a proceeding before the National Labor Relations Board does not deprive the court of authority to order arbitration and enforce the agreement.

The underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process. (See *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Co.*, 363 U.S. 593; *Charles Dowd Box Co., Inc.* v. *Courtney*, 368 U.S. 504; *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U.S. 95.)

The controlling statute, section 301 of the National Labor-Management Relations Act, envisages parallel private and public proceedings in situations where a breach of an agreement also involves determinations under the Act. Section 301 was designed to vindicate private rights under a contract, while section 8, relating to unfair labor practices, and section 9, relating to representation, were designed to vindicate public rights provided under the National Labor Relations Act. The circumstance that there might be a claim before the National Board *at some date*

in the future should not operate to deprive the parties of contract rights at the present time. (But cf. *Raytheon Co.* v. *Local Lodge No. 1386 of District 38 IAM*, — F. 2d — [50 LRRM 2337, decided by Court of Appeals, First Circuit, June 4, 1962, revg. 201 F. Supp. 334, in which two unions had actually asserted conflicting claims as to representation.) The pre-emption postulates enunciated by the Supreme Court over the past several years (see, e.g., *Garner* v. *Teamsters Union*, 346 U.S. 485; *San Diego Unions* v. *Garmon*, 353 U.S. 26; *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, — U.S. —, decided June 11, 1962) concerned actions instituted in state courts to remedy torts which were, arguably, an unfair labor practice or, arguably, a protected activity under the Federal statute.[1] The prohibitions spelled out in those cases against state court intrusion upon the exclusive jurisdiction of the National Labor Relations Board have no applicability to actions for breach of a collective bargaining agreement.

The collective bargaining agreement governing wages, hours and conditions of employment is the ultimate objective of the labor relations laws. Arbitration is an integral part of the administration and enforcement of the collective bargaining agreement, and Federal and State court sanction an essential aid to such process.

. . . . . .

Order affirmed, without costs. Opinion Per Curiam. All concur except Fuld, J., who dissents in part and votes to modify in a separate opinion.

---

[1] In any event, since there was here no claim that the union restrained or coerced the employees or engaged in or encouraged the employees to engage in a strike or resorted to any of the other activities defined in section 8 (b) of the National Labor Relations Act, there is no basis for any charge that the union was guilty of unfair labor practice or prohibited conduct under that statute.

APPENDIX B

STATUTE INVOLVED

The statute involved is the Labor Management Relations Act, of 1947, Act of June 23, 1947; C. 120, 61 Stat. 136-162, 29 U.S.C. § 151 et seq.

SEC. 8

(b) It shall be unfair labor practice for a labor organization or its agents—

* * * * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

SEC. 9.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

SEC. 10.

* * * * * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute

with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

SEC. 301.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individul member or his assets.

APPENDIX C

The following are the pertinent provisions of the collective bargaining agreement on which this action is based:

Section I—Recognition

1. The Company agrees to recognize the Union, on behalf of and in conjunction with its Locals, for those units where the Union or its Locals, through a lawful National Labor Relations Board certification, have been lawfully designated as the exclusive bargaining representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. The units and Locals referred to in the preceding sentence are set forth in the Appendix attached hereto and made a part of this Agreement.

2. Any units for which the Union or any of its Locals shall be lawfully certified by the National Labor Relations Board as exclusive bargaining representative, shall, upon assent in writing to this Agreement by such representative, be included in and covered by this Agreement as of the date of certification, except that either party may withhold the application of those portions of this Agreement considered inapplicable to such units by giving written notice to the other party within thirty (30) days of such representative's assent.

Section VIII—Wages

Wages will be paid in accordance with wage schedules effective in the various bargaining units. All wage schedules are negotiated locally. The following provisions affecting wages are applicable to all units. • • •

8. Time Values and General Wage Procedures for Incentive Operations

• • • • • • •

E. Recorded time values (as differentiated from temporary time values) will be changed only for the following reasons:

(1) When a clerical error has been made in the determination of the time value.

(2) (a) When there is a change in the method of manufacture, tools, material, design, production conditions or servicing conditions that affects the time value, only that portion of the value affected by the change will be adjusted. Sufficient additional elements to those affected by the change may be time studied to determine the effect of the change on the existing time value.

(b) When a change is to be made in an operation, the time value for which is not broken down into elements, a time study may be taken before the change is made in order to establish the elements of the existing time value; but the time value will not be changed as a result of this study. When the change in the operation is made the provisions of sub-section (2) (a) of this paragraph will apply.

(c) Management recognizes that time values should be revised as soon as possible after the changes have been completed.

* * * * * * *

SECTION XIV-A—ARBITRATION

A. Except as otherwise provided in this Agreement, any grievance involving action taken or failure to act subsequent to March 20, 1956, which remains unsettled after the grievance procedure has been exhausted pursuant to Section XIV and which involves either

(1) The interpretation, application or claimed violation of a provision of this Agreement or of a local supplement in effect in the bargaining unit in which the grievance arose, or

(2) a disciplinary penalty, release or discharge which is alleged to have been imposed without just cause,

shall be submitted to arbitration upon the written request of either the Union or the Company. Such request shall be made within thirty (30) days after the Company receives

notice that its final reply at the national appeal level is unsatisfactory. If no request for arbitration is made by either the Company or the Union during such thirty (30) day period, both parties shall be deemed to have waived their right to make such request. For the purpose of proceedings within the scope of (2) above, the standard to be applied by an arbitrator to cases involving disciplinary penalties, releases or discharges is that they shall be imposed only for just cause.

• • • • • • •

C. In the selection of an arbitrator and the conduct of any arbitration proceeding, the Voluntary Labor Arbitration Rules of the American Arbitration Association, as amended and in effect March 1, 1952 (and which have remained in effect until the effect until the effective date of this Section) shall control, except that:

• • • • • • •

(5) The American Arbitration Association shall have no authority to process a request for arbitration or appoint an arbitrator if either party shall advise the Association that the grievance desired to be arbitrated does not, in its opinion, raise an arbitrable issue. In such event, the Association shall have authority to process the request for arbitration and appoint an arbitrator in accordance with this Agreement and the above-mentioned Rules only after a final judgment of a Court has determined that the grievance upon which the arbitration has been requested raises an arbitrable issue or issues. The foregoing part of this Paragraph (5) shall not be applicable if by its terms the request for arbitration requests only relief from a disciplinary penalty, release or discharge alleged to have been imposed without just cause.

D. Notwithstanding any other provisions of this Agreement, no arbitrator shall, without specific written agreement of the Company and the Union with respect to the arbitration proceeding before him, be authorized to:

(1) Add to, detract from, or in any way alter the provisions of this Agreement or any Supplement or local supplement to this Agreement;

(2) Establish or modify any wage or salary rate, job classification or classification of any employe except as provided in Section VIII, Paragraphs 9. D. and 9. E., or any time value under the incentive system;

(3) Make any award with respect to the release of any new employe during his or her probationary period;

(4) Make any award involving any matter relating to any pension and/or insurance agreement between the parties, any pension or insurance plan referred to or made a part of any such agreement, or the establishment, change, interpretation, application or administration of any pension or insurance plan;

(5) Make any award requiring payment to any employe for any period more than thirty (30) days preceding the filing of the grievance.

. . . . . .

F. The award of an arbitrator shall be in writing and shall be final and binding upon the parties to this Agreement, the employe or employes involved in the grievance, and the Local representing the bargaining unit in which the grievance arose.

. . . . . .

Appendix

Units for Which the Union or Its Locals Have Been Certified on the Date of This Agreement. As Used Herein, the Term "Union" Means the International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O. and the Term "Local" Means a Local of the Union.

. . . . . .

ITEM 2

Location: BALTIMORE WORKS—X-RAY AND INDUSTRIAL ELECTRONICS DIVISION AND ORDNANCE DIVISION BARGAINING REPRESENTATIVE:

Westinghouse Local 130

UNIT: All production and maintenance employees of the Employer at its Baltimore Works located at 2519 Wilkens Avenue and 3601 Washington Boulevard, Baltimore, Maryland, including group leaders, and shop clerical employees, but excluding all salaried technical, office and office clerical employees, salaried time study clerks, clerical employees in the production planning department, guards, professional employees, and supervisors as defined in the Act.